

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34178¹

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND CEDAR AMERICAN RAIL HOLDINGS, INC.

— CONTROL —

IOWA, CHICAGO & EASTERN RAILROAD CORPORATION

Decision No. 9

Decided: April 21, 2003

As discussed below, we have before us several pleadings related to trackage rights issues that have been raised in these proceedings. Because they raise common issues, we intend to decide them at one time. Before we do, however, we are directing Dakota, Minnesota & Eastern Railroad Corporation (DM&E) and Union Pacific Railroad Company (UP) to enter into the record a complete copy of the 1986 trackage rights agreement (the 1986 TRA) that governs DM&E's operations over the 2.4-mile UP-owned line segment in Owatonna, MN.

BACKGROUND

In Decision No. 7 (served February 3, 2003): (1) we approved, subject to the standard New York Dock labor protective conditions,² the acquisition by DM&E of control of Iowa, Chicago & Eastern Railroad Corporation (IC&E); (2) we denied DM&E's request for an order for terminal trackage rights under 49 U.S.C. 11102 requiring UP to permit DM&E to operate, without restriction, over an approximately 3,700-foot segment of UP track in Owatonna that DM&E argued was "terminal trackage";³ and (3) we authorized, subject to the standard Norfolk and Western labor protective

¹ This decision embraces: STB Finance Docket No. 34178 (Sub-No. 1), Dakota, Minnesota & Eastern Railroad Corporation — Terminal Trackage Rights — Union Pacific Railroad Company, and STB Finance Docket No. 34178 (Sub-No. 2), Dakota, Minnesota & Eastern Railroad Corporation — Trackage Rights Exemption — Iowa, Chicago & Eastern Railroad Corporation and Iowa Northern Railway Company.

² New York Dock Ry. — Control — Brooklyn Eastern Dist., 360 I.C.C. 60, 84-90 (1979).

³ DM&E sought terminal trackage rights over the 3,700-foot segment of UP track to create a DM&E/IC&E connection at Owatonna.

conditions,⁴ operation by DM&E, pursuant to overhead trackage rights, on the IC&E line between Owatonna, MN, and Mason City, IA, and on the Iowa Northern Railway Company (IANR) line between Plymouth Junction and Nora Springs, IA. We also expressed confidence that DM&E and UP could negotiate a mutually agreeable arrangement for DM&E's use of UP's trackage at Owatonna for interchange of traffic with IC&E. In view of the importance of establishing a DM&E/IC&E connection at Owatonna, we urged DM&E and UP to quickly resolve this issue, and we directed DM&E and UP to report to the Board, by April 4, 2003, on the status of their negotiations regarding this issue.

In Decision No. 8 (served February 21, 2003), the deadline for filing petitions for reconsideration of Decision No. 7 was extended, at DM&E's request, to March 17, 2003.

On March 5, 2003, DM&E consummated the acquisition of control of IC&E, terminating the voting trust in which the stock of IC&E had been held.

On March 19, 2003, DM&E filed a petition (DME-13) that seeks reconsideration and reopening of Decision No. 7. DM&E also filed, on March 19, 2003, a request (DME-14) for leave to file its DME-13 petition 2 days late. Because DM&E's petition was not timely filed, we will not treat it as a petition for reconsideration, but rather as a petition to reopen. Compare 49 CFR 1115.3 and 1115.4.

In DME-13, DM&E asks that we reconsider the denial of DM&E's request for terminal trackage rights and find that DM&E has satisfied the criteria of 49 U.S.C. 11102(a) with respect to the existing Owatonna trackage. DM&E further asks, alternatively, that we reopen this matter and confirm that, pursuant to 49 U.S.C. 11321(a), the existing DM&E/UP Owatonna trackage rights agreement is overridden to the extent necessary to allow direct DM&E/IC&E train movements over the existing Owatonna trackage.

As noted in Decision No. 7, the 3,700-foot (approximately 0.7-mile) segment of UP's Owatonna track over which DM&E seeks terminal trackage rights lies at the western end of a 2.4-mile UP line segment that extends between MP 88.6 (at the western end) and MP 86.2 (at the eastern end), and that includes, at approximately MP 87.9, a physical at-grade connection with the north-south IC&E line. As also noted in Decision No. 7, DM&E owns the rail lines that extend west from MP 88.6 and east from MP 86.2, but DM&E does not own — rather, it has trackage rights over — the 2.4-mile segment that lies between MP 88.6 and MP 86.2. And, as DM&E has previously acknowledged, DM&E's trackage rights over the 2.4-mile segment are “restricted” by the terms of the 1986 TRA that created them: DM&E can only use these trackage rights for overhead (i.e., bridge) traffic and for DM&E/IC&E interchange traffic that originates or terminates either on the 2.4-mile

⁴ Norfolk and Western Ry. Co. — Trackage Rights — BN, 354 I.C.C. 605, 610-15 (1978), as modified in Mendocino Coast Ry., Inc. — Lease and Operate, 360 I.C.C. 653, 664 (1980).

segment or at industries in Owatonna served by IC&E and open to reciprocal switching. See Decision No. 7, slip op. at 10-11.

In the DME-13 petition, DM&E advises that, in its opinion, the 1986 TRA may not be as restrictive as DM&E had previously indicated. DM&E advises that it now believes that it can use its 1986 trackage rights over the 3,700-foot segment “to bridge to itself via its trackage rights over IC&E, which were approved by the STB in Decision No. 7,” and, once it “bridge[s]” to itself, can “interchange” traffic beyond Owatonna. DME-13 at 3 n.1. Whereas DM&E previously believed that the 1986 TRA permitted it to bridge between DM&E at MP 88.6 and DM&E at MP 86.2, its new interpretation of the 1986 TRA would also permit it to bridge between DM&E at MP 88.6 (DM&E operates, west of this point, over track it owns) and DM&E at MP 87.9 (DM&E operates, south of this point, via its newly authorized trackage rights over track owned by IC&E). See also DME-13 at 6-7 (DM&E “believes that certain DM&E ‘bridge’ movements to the IC&E line via the existing Owatonna trackage are contractually permissible”).⁵

At some time during the week of March 17, 2003, DM&E began conducting what it asserts are contractually permissible “bridging” operations over the 3,700-foot segment of UP’s track that lies between MP 88.6 and MP 87.9. See DME-16 (filed March 25, 2003), Schieffer v.s. at 2.

On March 21, 2003, UP — which does not accept DM&E’s new interpretation of the operations authorized by the 1986 TRA — filed a petition (UP-5) for an “emergency order” enjoining DM&E from engaging in what, in UP’s view, are unauthorized operations over UP’s Owatonna trackage. UP contends that we should “reaffirm” our conclusion in Decision No. 7 that DM&E has no authority to operate over UP’s Owatonna trackage to connect with IC&E in Owatonna and we should enjoin DM&E from engaging in such unauthorized operations.

On March 25, 2003, DM&E filed its preliminary reply (DME-16) in opposition to UP’s petition for an emergency order. According to DM&E, this is a contractual dispute and UP should seek to protect its asserted contractual interests in an appropriate court rather than at the Board.

On March 27, 2003, UP filed a response to DM&E’s DME-16 preliminary reply, urging that we act immediately to enjoin DM&E’s unauthorized operations over UP’s trackage.

On April 2, 2003, DM&E filed its final reply (DME-17) to the petition for an emergency order, arguing that the petition should be denied in its entirety.

⁵ DM&E asserts, however, that the DM&E/IC&E connection that it claims it can establish under the 1986 TRA “is clearly and materially inferior” to the DM&E/IC&E connection using the terminal trackage rights that it continues to seek. See DME-17 (filed April 2, 2003), Schieffer v.s. at 9-10.

On April 4, 2003, DM&E and UP separately filed their status reports (DME-18 and UP-6, respectively) respecting their negotiations for a DM&E/IC&E connection at Owatonna. DM&E and UP report that negotiations thus far have not produced an agreement.

On April 8, 2003, UP filed its reply (UP-7) to the DME-13 petition for reconsideration and reopening. UP urges the denial of that petition.

DISCUSSION AND CONCLUSIONS

In its various pleadings filed since the issuance of Decision No. 7, DM&E has suggested three approaches by which it might establish a DM&E/IC&E connection at Owatonna, as an alternative to constructing the new 1.7-mile connection just east of Owatonna that we recently approved. First, DM&E contends that we should expand the trackage rights it has under the 1986 TRA by granting DM&E “terminal trackage rights” under 49 U.S.C. 11102(a). Second, DM&E contends that we should expand the trackage rights it has under the 1986 TRA by overriding, under the auspices of 49 U.S.C. 11321(a), the restrictions imposed by that agreement. Third, DM&E contends that it can already establish at Owatonna, under the terms of the 1986 TRA, a broader DM&E/IC&E connection than DM&E had previously indicated was possible (although, DM&E adds, not as broad as the connection it could establish with a grant of terminal trackage rights). The 1986 TRA also is central to UP’s petition for an emergency order enjoining DM&E from engaging in what UP considers to be unauthorized operations over UP’s Owatonna trackage.

We intend to decide all of these matters at one time because they involve common issues. The record in this proceeding, however, does not include a complete copy of the 1986 TRA that governs DM&E’s operations over the UP-owned line segment in Owatonna. Before we can decide what, if any, relief on the issues raised by the DME-13 and UP-5 petitions is appropriate, we need to examine the 1986 TRA.

We are therefore directing DM&E and UP (jointly if possible, separately if necessary) to enter into the record a complete copy of the 1986 TRA. If that agreement includes details that should be kept under seal, the parties may submit two copies: a confidential copy, subject to the protective order issued in Decision No. 3 (served October 17, 2002), and a public copy, from which the confidential details have been redacted. We expect, however, that the details that are kept confidential will not include details respecting the scope of the trackage rights created by the 1986 TRA.

Once we have had an opportunity to review the 1986 TRA, we intend to address, in a single decision, all of the issues raised by the DME-13 and UP-5 petitions.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. By April 28, 2003, DM&E and UP should enter into the record (jointly if possible, separately if necessary) a complete copy of the 1986 TRA.
2. This decision is effective on the service date.

By the Board, Chairman Nober and Commissioner Morgan. Commissioner Morgan commented with a separate expression.

Vernon A. Williams
Secretary

Commissioner Morgan, commenting:

While our examining the terms of the subject trackage rights agreement may be beneficial in resolving certain unique issues remaining in this merger proceeding, action here in my view does not stand for the general proposition that the Board will routinely engage in the interpretation or enforcement of privately negotiated contracts.